IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.16 OF 2005

Devchand Gojur .. Appellant

Versus

The Mumbai Municipal

Corporation .. Respondents

Mr.Rajendra Yadav for appellant

Mr.Xavier for B.M.C.

CORAM : S.C.DHARMADHIKARI,J.

Vacation Judge.

DATE : JANUARY 6, 2005.

P.C.

. Heard. By consent appeal is taken up for hearing forthwith. Paperbook dispensed with.

2. Appellant before me is the original plaintiff who has instituted Suit No.3760 of 2003 in the City Civil Court. Appellant applied for ad-inteim order by taking out notice of motion. Ad-interim order was sought to restrain Municipal Corporation of Mumbai from demolishing the structure/ suit premises which are more particularly described in prayer (a) of the notice of motion and executing a show cause notice as well as an order of Assistant Municipal Commissioner, with regard to the same.

3. It is contended by the learned Counsel appearing for appellant that the trial court initially refused to grant any ad-interim order on the motion. Aggrieved by the refusal of trial court to grant any ad-interim reliefs, appellant approached this Court in A.O. 685 of 2003. On C.A. 1019 of 2003, this Court on 8th October 2003, protected the suit premises till disposal

of the appeal from order. Thereafter, the protection granted was continued till the hearing of notice of motion and the appeal came to be disposed of by this Court finally.

4. It appears that when notice of motion was heard neither the appellant - original plaintiff, nor his Advocate was present. It is brought to my notice by the learned Advocate appearing for appellant that he was representing plaintiff in the trial court but when the motion was called out for hearing and final disposal before the concerned Court, he could not remain present as he was on his legs in another matter in adjacent court. He could not even make any arrangement by requesting somebody to take care of the matter and on account of this mistake on his part, the appellant has suffered inasmuch as the learned Judge has proceeded to decide the motion on merits ex parte. Learned Counsel appearing for Corporation supports the order of the trial court

on merits by pointing out that documents produced on record do not pertain to the structure which is claimed by appellant.

5. Be that as it may, since the order passed by the trial court on 28th December 2004 is an ex parte order and as the appellant and his Advocate could not remain present in the court, interest of justice would be served if the said order is set aside and the notice of motion taken out by appellant is restored to file.

6. The trial court is, therefore, directed to hear and dispose of motion No.2599 of 2004 in L.C. Suit No.3760 of 2004 afresh after giving opportunity of hearing to appellant as well as defendants.

7. Ad-interim order protecting the structure in question shall continue till the hearing and final disposal of the motion. Parties to appear

before the trial court on 13th January 2005 and the trial court shall dispose of the motion within a period of four weeks from the date of appearance of parties.

8. Trial court to dispose of the notice of motion on merits and in accordance with law uninfluenced by the observations made in the impugned order. All contentions on merits are expressly kept open.

9. I have protected the structure in question on the clear statement of learned Counsel for appellant that Corporation has not yet taken any action to demolish the same, although order impugned in this appeal is passed on 20th December 2004. Appeal is disposed of with the above directions.

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